

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**S.E., Appellant**

**and**

**U.S. POSTAL SERVICE, AIR MAIL CENTER,  
St. Paul, MN, Employer**

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**Docket No. 10-1888  
Issued: April 21, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On July 13, 2010 appellant filed a timely appeal from a March 1, 2010 decision of the Office of Workers' Compensation Programs denying her request for a review of the written record. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this decision. Because more than 180 days elapsed between the most recent Office merit decision dated December 22, 2009 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the case.

**ISSUE**

The issue is whether the Office properly denied appellant's request for a review of the written record under 5 U.S.C. § 8124(b).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On October 27, 2009 appellant, then a 45-year-old mail handler, filed a traumatic injury claim alleging that she sustained an adverse respiratory reaction and laryngitis on September 17, 2009 due to a chemical that was sprayed at the employing establishment. She did not stop work.

In September 17, 2009 emergency department records signed by Dr. Deborah L. Abney-Lidahl, a Board-certified emergency physician, appellant presented mild shortness of breath, tight chest pain and a hoarse and abnormal voice. She related that she was exposed to an unidentified aerosol while working. On physical examination, appellant exhibited apparent distress but no other abnormalities. Dr. Abney-Lidahl diagnosed anxiety disorder, acute dyspnea and laryngitis.<sup>2</sup>

The Office informed appellant on November 19, 2009 that the evidence was insufficient and advised her of the evidence needed to establish her claim. Appellant submitted a September 17, 2009 paramedic report.

By decision dated December 22, 2009, the Office denied appellant's claim, finding the evidence insufficient to demonstrate that the September 17, 2009 work event caused or contributed to her diagnosed condition.

In an appeal request form signed January 20, 2010, appellant requested a review of the written record. The envelope containing the request was postmarked January 25, 2010. Appellant provided medical records for the period June 6, 2007 to December 11, 2009.

In a March 1, 2010 decision, the Office denied appellant's request on the basis that she failed to make her request within 30 days after issuance of the Office's December 22, 2009 decision. Appellant was not, as a matter of right, entitled to a review of the written record. It further considered whether to grant a discretionary review and determined that the issue could equally be addressed by requesting reconsideration before the Office and submitting new evidence.

## **LEGAL PRECEDENT**

Section 8124(b)(1) of the Act provides that a claimant for compensation who is not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision and before review under section 8128(a), to a hearing on her claim before a representative of the Secretary.<sup>3</sup> Federal regulations implementing this section of the Act provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.<sup>4</sup> Although the claimant is no longer entitled to an oral hearing or review of the written record as a matter of right if the request is filed past

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<sup>2</sup> The record also contains an October 12, 2009 return-to-work form involving a January 5, 2009 injury that is not at issue in this case.

<sup>3</sup> 5 U.S.C. § 8124(b)(1); *Peggy R. Lee*, 46 ECAB 527 (1995).

<sup>4</sup> 20 C.F.R. § 10.615.

the 30-day period or she previously requested reconsideration pursuant to section 8128(a), the Office may within its discretionary powers grant or deny appellant's request and must exercise that discretion.<sup>5</sup>

### **ANALYSIS**

Appellant argues on appeal that she is entitled to a review of the written record since she signed the appeal request form on January 20, 2010. Under the Office's regulations and procedures, the timeliness of a request for a hearing is determined on the basis of the postmark of the envelope containing the request.<sup>6</sup> Here, the envelope containing appellant's request was clearly postmarked January 25, 2010, which was more than 30 days after the Office issued its December 22, 2009 merit decision. As section 8124(b)(1) is unequivocal on the time limitation for requesting a hearing,<sup>7</sup> appellant was not entitled to a review of the written record.

The Office also has the discretionary power to grant a section 8124(b)(1) hearing when a claimant is not entitled to one as a matter of right. In its March 1, 2010 decision, the Office exercised its discretion and found that appellant's issue could also be addressed by requesting reconsideration before the Office and submitting additional evidence. This basis for denying her request is a proper exercise of the Office's discretionary authority.<sup>8</sup> There is no evidence showing that the Office abused its discretion in this matter. Accordingly, the Office correctly denied appellant's request for a review of the written record.<sup>9</sup>

### **CONCLUSION**

The Board finds that the Office properly denied appellant's request for a review of the written record under 5 U.S.C. § 8124(b).

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<sup>5</sup> *Eddie Franklin*, 51 ECAB 223 (1999).

<sup>6</sup> 20 C.F.R. § 10.616(a); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.4(a) (June 1997).

<sup>7</sup> *William F. Osborne*, 46 ECAB 198 (1994).

<sup>8</sup> *Mary B. Moss*, 40 ECAB 640, 647 (1989).

<sup>9</sup> Appellant further argues that the medical evidence already submitted was sufficient to establish her traumatic injury claim. As previously mentioned, the Board does not have jurisdiction over the merits of her claim; it only has jurisdiction to consider whether the Office properly denied a review of the written record as being untimely filed.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 1, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 21, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board